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July 26, 1995

26 1995

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Spanish Broadcasting Systems of Florida, Inc.  
MM Docket No. 93-136  
RM-8161, RM-8309, RM 8310

Dear Mr. Caton:

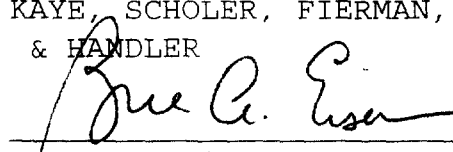
On behalf of Spanish Broadcasting Systems of Florida, Inc., there is transmitted herewith an original and 4 copies of its Motion to Dismiss, or Alternatively, Opposition to Motion for Stay.

Should any questions arise with regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS  
& HANDLER

By:

  
Bruce A. Eisen

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List A B C D E

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

RECEIVED  
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In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
FM Table of Allotments	)	MM Docket No. 93-136
Clewiston, Fort Myers Villas,	)	
Indiantown, Jupiter, Key Colony	)	RM-8161, RM-8309, RM 8310
Beach, Key Largo, Marathon and	)	
Naples, Florida	)	

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TO: The Commission

**MOTION TO DISMISS, OR ALTERNATIVELY,  
OPPOSITION TO MOTION FOR STAY**

Spanish Broadcasting Systems of Florida, Inc. ("SBSF"), by its attorneys, hereby requests the Commission to dismiss the Motion for Stay filed on behalf of the licensees of Stations WPBZ(FM) at Indiantown, Florida; WROC(FM) at Fort Myers Villas, Florida; and WJBW(FM) at Jupiter, Florida ("Joint Petitioners"). Alternatively, it is requested that the Commission deny the motion on its merits. In support thereof, the following is shown:

1. On July 20, 1995, Joint Petitioners filed an Application for Review of the Memorandum Opinion and Order, DA 95-1250, Chief, Policy and Rules Division (released June 14, 1995) ("MO&O"), which had denied their Petition for Reconsideration of a Report and Order, 9 FCC Rcd 4051 (1994), granting SBSF's proposal to change the frequencies of certain Florida FM radio stations in order to eliminate Receiver-Induced Third Order Intermodulation Interference ("RITOI"). Joint Petitioners simultaneously filed their Motion for Stay. SBSF will respond to the Application for Review in due course.

2. The Motion For Stay should be dismissed as moot. Joint Petitioners became entitled to an automatic stay of the MO&O upon their filing of the aforementioned application for review, because the MO&O modifies existing authorizations in order to specify operations on different channels. See, Arlington, Texas, 6 FCC Rcd 2050, 2051, n.2 (1991).<sup>1</sup>

3. While the Motion for Stay is moot, nevertheless, SBSF herein addresses certain elements that must be considered in order to justify a stay, and which are set forth at paragraph 1 of Joint Petitioners' motion. If the Commission believes that the Joint Petitioners must demonstrate that they are entitled to a stay, or if the rule making is swiftly concluded and is adopted as proposed, then the motion should be denied.

4. It is unlikely that Joint Petitioners will have success on the merits. The cases which they cite and offer as proof that they have somehow been denied rights under Melody Music, 345 F2d 730 (D.C. Cir. 1965), do not support their argument. Indeed, the kinds of supplementary information provided in the course of rule making proceedings that have been accepted by the Commission in the past, and the circumstances that were extant in such rule makings, remove them from the facts of this case. A primary case relied upon by the Joint Petitioners does not, as they contend, allow for reimbursement pledges at any time before the rule making record is closed. Hence, Mary Esther, Florida, 7 FCC Rcd 1417 (Chief, Allocations Branch, 1991), does not use the term "record" in the sense that Joint Petitioners

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<sup>1</sup> On July 21, 1995, the Commission released its Notice of Proposed Rule Making in MM Docket No. 95-110, FCC 95-277, thereby proposing to delete that portion of Section 1.420(f) of the Rules which provides for automatic stays in cases such as this. The Commission also affirmed that applications for review presently trigger automatic stays, just as do petitions for reconsideration.

do. In any event, a separate basis for the decision on reconsideration was the unsuitability of a particular reference site for Station WROC(FM), and Joint Petitioners have not adequately come to terms with that failure in the Motion for Stay. Their conclusions at paragraph 5, unjustifiably place the onus for their predicament upon the Commission.

5. Another important element in determining whether or not a stay is warranted, concerns the prospect of substantial harm to other parties interested in the proceedings. A review of the 1994 Report and Order which preceded the MO&O, shows that the RITOI interference was of such scope, and its effects so deleterious, that comments had been filed by, inter alia, the Florida Keys Electrical Cooperative Association, Inc., an electricity cooperative consisting of homeowners and businesses, that provides electricity to various communities in the Florida Keys. The Cooperative's comments refer to the interference caused to Station WCTH(FM), the subcarrier of which it utilizes for its load control. Those comments also note that Station WCTH(FM)'s power, height and central location uniquely position the facility to provide the Cooperative with effective load control, and that its absence would hamper its ability to furnish an uninterrupted supply of electricity to the Keys during peak loads. The Commissioner of Plantation Key Government Center also filed supporting comments, referring to the electricity problems that the area could experience if the interference continued. These comments point out graphically that the stay could substantially harm other parties interested in the proceeding, i.e. residents of the Keys, who need electrical power and stand to lose if the RITOI interference continues.

In light of the foregoing, the motion should be denied on the merits, if not dismissed for mootness.

Respectfully submitted,

SPANISH BROADCASTING SYSTEMS, INC.

By:



Bruce A. Eisen

James M. Weitzman

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July 26, 1995

**CERTIFICATE OF SERVICE**

I, Linda G. Walker, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, do hereby certify that I caused a copy of the foregoing Motion to Dismiss, or Alternatively, Opposition to Motion for Stay” to be mailed, first-class, postage prepaid, this 26th day of July, 1995 to the following:

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